

FOIA 101



COMPLIANCE WITH THE VIRGINIA FREEDOM OF INFORMATION ACT

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INTRODUCTION:

The Public Policy Behind FOIA



- To ensure ready access to “*public records*” in the custody of a “*public body*” or its officers and employees, and...
- To ensure “free entry to meetings of public bodies wherein the business of the people is being conducted.”

“The affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government.” Va. Code § 2.2-3700

THE MANDATE



- Unless there is an exemption *provided by statute* and the public body specifically and correctly invokes that exemption...
 - a. *EVERY MEETING SHALL BE OPEN TO THE PUBLIC, and*
 - b. *ALL PUBLIC RECORDS SHALL BE AVAILABLE FOR INSPECTION AND COPYING UPON REQUEST.*
 - c. FOIA dictates “liberal construction” generally and “narrow construction” of exemptions, i.e., disclosure is favored.

ACCESS TO PUBLIC RECORDS

“Public Body” - Defined



- Any legislative body, authority, board, bureau, commission, district or agency of the Commonwealth or of any political subdivision of the Commonwealth, including cities, towns and counties, municipal councils, governing bodies of counties, school boards and planning commissions; boards of visitors of public institutions of higher education; and other organizations, corporations or agencies in the Commonwealth supported wholly or principally by public funds ... **It shall not exclude any such committee, subcommittee or entity because it has private sector or citizen members...**”

Va. Code § 2.2-3701

ACCESS TO PUBLIC RECORDS

“Public Record” Defined



Short Definition:

- A “public record” is any writing or recording, **in any format**, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business.

ACCESS TO PUBLIC RECORDS

“Public Record” Defined



Long Definition:

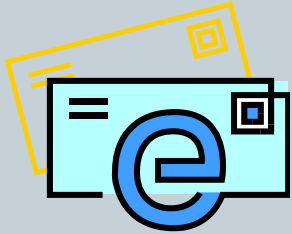
- All writings and recordings that consists of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostatting, photography, magnetic impulse, optical or magneto-optical form, mechanical or electronic recording or other form of data compilation, however stored, and regardless of physical form or characteristics, prepared or owned by, or in the possession of a public body or its officers, employees or agents *in the transaction of public business*. Va. Code § 2.2-3701

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All Writings – Really?



E-mails?



Notes?



Pictures?



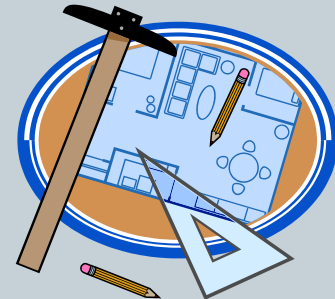
Maps?



**Drafts -
of Everything?**



Plans?



ACCESS TO PUBLIC RECORDS

Email Messages



DANCE LIKE NO ONE IS
WATCHING; EMAIL LIKE IT
MAY ONE DAY BE READ ALOUD IN A
DEPOSITION.

ACCESS TO PUBLIC RECORDS

Text Messages



- Text Messages that relate to the public business ARE public records, regardless of whether you use your personal or office computer, phone, Ipad, etc.
- It is the **content** of the record, not the equipment used, that controls.
- Applies regardless of whom you are exchanging texts with - citizens, fellow Council/ Board members, or your locality's employees.

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Text Messages



- Since they are public records, text messages ***must be retained*** and ***should not be deleted***.
- If utilizing a personal phone, best practice is to copy text messages relating to public business and email them to your City/Town/County email. That will ensure that these messages are retained without needing to invade your privacy.

ACCESS TO PUBLIC RECORDS

Text Messages




- If you are using an iPhone, by simultaneously pressing the home key and the on/off on the right side you can capture a photograph screen shot of the text message.



ACCESS TO PUBLIC RECORDS

Text Messages



- Next you can pull up the image in your “Photos” and forward to your City/Town/County email address using the  icon at the bottom left of your screen.
- This method captures the most information – the name of the person you are texting with, the date, and the time the message was sent/received.

ACCESS TO PUBLIC RECORDS

Who Is Entitled To Public Records?



“Citizens” of the Commonwealth



- May require identification
- May require legal address

ACCESS TO PUBLIC RECORDS

Who Is Entitled To Public Records?



**Representatives of newspapers and
magazines with circulation in the
Commonwealth**

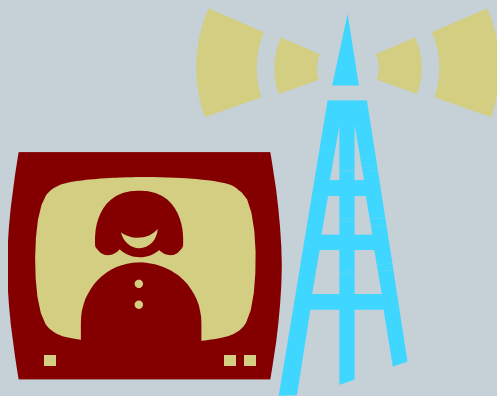


ACCESS TO PUBLIC RECORDS

Who Is Entitled To Public Records?



Representatives of radio and television stations broadcasting in or into the Commonwealth



ACCESS TO PUBLIC RECORDS

Who Is Entitled To Public Records?



“No prisoners” – Persons incarcerated in any correctional facility (in Virginia or otherwise) are not entitled to records under the FOIA



ACCESS TO PUBLIC RECORDS

What *IS* a FOIA Request for Records?



- *Any request of a public body through its members, officers, employees or agents for a record...*
 - ✓ Verbal or written
 - ✓ In person or by phone/mail
 - ✓ By carrier pigeon, skywriting, etc.

Whether the requestor mentions FOIA or not, we cannot require magic words and cannot require a writing or completion of forms.

ACCESS TO PUBLIC RECORDS

Keep a Log...Suggested Practice



- While a written request specifically mentioning FOIA is not and cannot be *required* of requestors, you are encouraged to ask anyway for recordkeeping purposes and to avoid misunderstandings/confusion.
- In any event, it is suggested that a FOIA log be used noting the following information...

ACCESS TO PUBLIC RECORDS

Information To Be Noted in FOIA Log



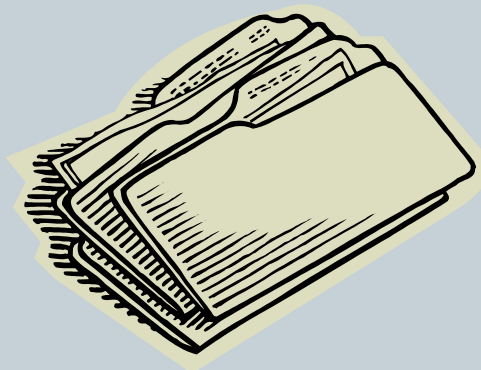
- Date of request
- Form of request (e.g., by telephone, in person, mail, etc.)
- Name of requestor
- Street address of requestor
- Email address
- Description of records requested (or attach copy of request)
- Inspect or copy
- Cost estimate requested?
- Anticipated charges
- Response due date
- Date response made
- Special questions unique to certain types of requests:
 - Body worn camera video – yes or no?

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FOIA Request/Response Retention Period



- FOIA logs, requests and responses shall be maintained for three (3) years after last action under state document retention and disposition schedules applicable to local governments.



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Responding to FOIA Requests for Records - Process



- The Locality **MUST** respond – failure to do so is deemed a denial of the request and is a violation of the statute.
- The Locality must respond in time – **within five (5) working days** of receipt of the request (in its initial form – don't wait for a verbal request to be submitted in writing). Day 1 is the day after receipt.
- **ALWAYS** USE A DATE STAMP!!!
- **Who** responds depends on your locality's process – but the FOIA officer is now officially responsible...

FOIA OFFICERS



- In 2016, the General Assembly enacted a new requirement that each public body designate a FOIA Officer.
- What is a FOIA Officer?
 - Designated by the locality – formal action/vote not required
 - One for the locality as a whole is permitted.
 - Constitutional officers need to designate their own FOIA officers but can be the same person serving as locality's FOIA officer.
- Must be identified on locality's website with contact information.
 - **2017 GA change:** FOIA Advisory Council also must keep list on its website
- Benefit – Consistency in the Locality's process/approach to FOIAs.

FOIA OFFICERS

Training Requirements



- Training Requirements: Must receive training at least annually by legal counsel for locality or FOIA Advisory Council.
 - FOIA Advisory Council developed online training course – technical difficulties encountered
 - **2017 GA change:** Locality must provide a list to Council by July 1st of the name and contact information of each FOIA officer that received training.

FOIA BILL of RIGHTS



- The 2016 legislature also enacted a requirement that each locality must post on its website rights and responsibilities under FOIA.

- FOIA Bill of Rights
 1. General basic information about the law
 2. Citizen's FOIA rights
 3. How to make a request
 4. Locality's responsibilities in responding
 5. Costs
 6. Types of Records
 7. Commonly used exceptions
 8. Policies for use of exceptions

PUBLIC COMMENT FORM



New in 2017!

- The Council must develop an online public comment form and post on its website (<http://foiacouncil.dls.virginia.gov>)
- Gives *any* requester the ability to comment on the “quality of assistance” provided to the requester by a public body.
- State public bodies, counties, cities or town (250+ population) must post a link on its website to the public comment form on Council’s website.

PUBLIC COMMENT FORM

What does it ask?



- Asks for the basics: What public body? What was the response?
- Asks “How satisfied were you with the response received?”
 - Scale of 1 to 5 where 1 is “Not Satisfied”; 3 “Acceptable”; 5 is “Fully Satisfied”
- Asks if the request was made through a FOIA officer and how easy (on a 1 to 5 scale) was it to find contact info
- Asks if there was a charge for the responsive documents and if that charge was “reasonable”.

PUBLIC COMMENT FORM

Concerns



- Not required to provide name or contact information
 - No means to identify if the requester was not entitled to make the request under FOIA (out of state requester, incarcerated)
- Va. Code provides no direction on what Council should do with this information.

ACCESS TO PUBLIC RECORDS

How to Respond...What Do You Say?



- Within the five (5) working day period, the Locality must make one of the following responses:
 1. **The requested records will be provided.**
(Should state when they will be provided; not required to be provided within the five (5) business days; can reach agreement on production date);
 2. **The requested records will be withheld**
because their release is prohibited by law or the Locality has elected to exercise its discretion to withhold the records pursuant to a specific FOIA exemption (which must be cited);

ACCESS TO PUBLIC RECORDS

How to Respond...What Do You Say?



3. **The requested records will be provided in part and withheld in part** because their release is prohibited by law or the Locality has elected to exercise its discretion to withhold the records pursuant to a specific FOIA exemption (which must be cited); or

4. **It is not practically possible to provide the requested records or to determine if they are available within the 5 work-day period**, and the Locality needs additional time [up to seven (7) additional work days] *to provide one of the preceding responses.*

ACCESS TO PUBLIC RECORDS

Respond in Writing?



- **Generally – respond in writing whether statute dictates it or not; proves that you did respond.**
- If any part of the response is a “NO” – **you must** respond in writing, stating the volume and subject matter of withheld records and citing the specific section of the Code of Virginia that exempts the records from mandatory disclosure (or other statute prohibiting disclosure).
- If invoking the “**additional time**” provision, **must** respond in writing and describe reasons we can’t do it in five (5) working days.

ACCESS TO PUBLIC RECORDS

Part Exempt Records/Part Non-exempt?



- The 2016 General Assembly added a new section, Va. Code §2.2-3704.01, to clarify that no provision of FOIA is intended, nor shall be construed or applied, to authorize a public body to withhold a public record in its entirety on the grounds that some portion of the public record is excluded from disclosure by FOIA or by any other provision of law. HB 817 & SB 494.
- Further, the new language explains that a public record may be withheld from disclosure in its entirety only to the extent that an exclusion from disclosure under FOIA or other provision of law applies to the entire content of the public record.
- The bills also added a definition of “information” and replaced the term “record” with “information” in several sections.



ACCESS TO PUBLIC RECORDS

No Need to “Create” Records



- “No public body shall be required to create a new record if the record does not already exist.” May “abstract” or “summarize” (but don’t have to) on terms and conditions as agreed between requestor and Locality. Va. Code § 2.2-3704(D).
- But must extract records from existing databases if needed

ACCESS TO PUBLIC RECORDS

Charges for Records Provided in Response



1. General Rule: Public bodies may make reasonable charges *not to exceed actual costs* incurred in duplicating, accessing, supplying or searching for requested records. (Va. Code § 2.2-3704H).
2. In fact, if we determine in advance that our actual costs are likely to exceed \$200, we may require payment of a deposit (up to the full amount of estimated costs) *before continuing to process a request*.

ACCESS TO PUBLIC RECORDS

Charges for Records Provided in Response



3. We may also delay processing a FOIA request where the requestor has previous unpaid FOIA bills over 30 days old.
4. The time in which the Locality must respond to the request is tolled for the amount of time between notice of the deposit amount and the requestor's response to the notice.

ACCESS TO PUBLIC RECORDS

Charges for Records Provided in Response



5. “Actual Costs” =

Hourly rate of salary for administrative/support staff or lowest level other employee necessary to access/identify requested records. (Can only charge contractor/vendor rates if we actually must seek outside help to retrieve records);

AND

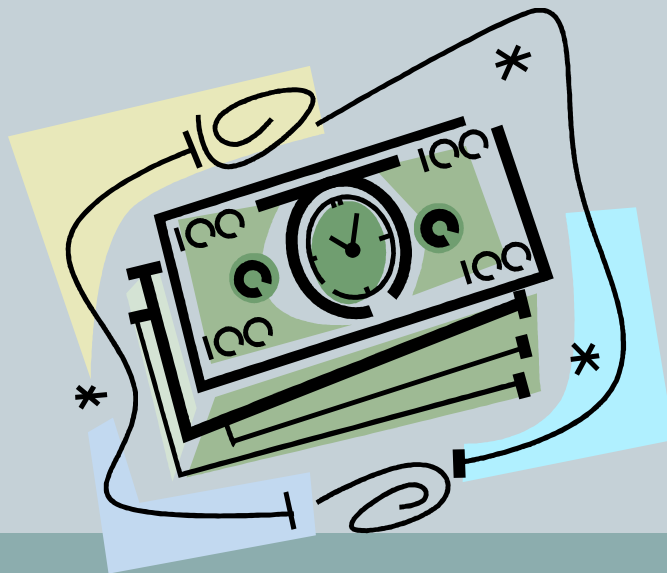
Per page copying costs (but what’s that on an actual cost basis?)

ACCESS TO PUBLIC RECORDS

Cost Estimates?



- Cost estimates are required if requested.
- Many requestors do not want to pay for responsive documents if there is a significant cost – best practice is to let requestor know the cost up front so that they may withdraw or reduce the request.



ACCESS TO PUBLIC RECORDS

Option to Inspect?



- Should offer in appropriate cases, but ultimately in the discretion of the requestor.

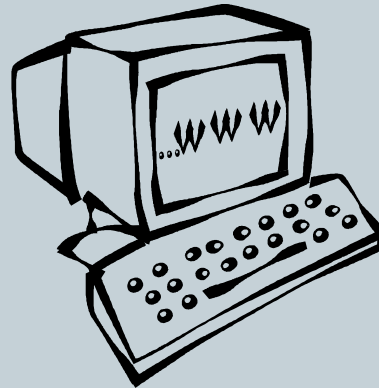


ACCESS TO PUBLIC RECORDS

Electronic Records



- Must be provided in the medium specified by the requestor *if it is a medium the Locality also uses in the regular course of business.*



ACCESS TO PUBLIC RECORDS

Isn't There an Exemption for This?



- Nothing in FOIA *requires* that a record be withheld – discretionary.
- Currently there are over 70 exemptions from mandatory disclosure under FOIA.

NOTE: Invocation of an exemption is purely discretionary with the Locality; but need to avoid apparently standard-less inconsistency in when/how exemptions are applied.

ACCESS TO PUBLIC RECORDS

Most Commonly Invoked Exemptions:



- Criminal investigative records
- Personnel records
- Victim names
- Complainant names
- Records protected by attorney-client privilege
- Legal memoranda and attorney “work product” compiled specifically for use in litigation or active administrative investigation which is properly subject of a closed meeting
- Vendor proprietary information software
- “Working papers”
 - **2017 change:** info publically available or not subject to other exclusion that has been aggregated, combined or changed in format *without substantive analysis or revision* does not qualify for exemption
- Records compiled exclusively for use in a (properly called) closed meeting
- Medical and mental health records
- Appraisals and cost estimates as to property to be purchased by the Locality

ACCESS TO PUBLIC RECORDS

But This Is “Confidential” – I Can’t Disclose This – Can I?



- A few (very few) statutes indeed *prohibit disclosure* of some records:
 1. Tax records
 2. Juvenile law enforcement records except in very limited and specific scenarios and usually require a court order
 3. Certain Social Services department records
 4. Certain student records
 5. First 5 digits of social security numbers

More often than not there is no legal prohibition on disclosure of records – it is a discretionary decision, please consult with your attorney.

ACCESS TO PUBLIC RECORDS

New Legislation



- The 2017 General Assembly amended Va. Code § 2.2-3706 to add a new type of record that is *required* to be released:
Records of completed unattended death investigations
- Can be released to the parent or spouse of the decedent or, if not living parent or spouse, the most immediate family member, *provided the person is not a person of interest or a suspect*.
- Creates a definition for "unattended death" that includes suicide, accidental or natural death where no criminal charges will be initiated.
- Defines "immediate family" to be the decedent's personal representative or, if no representative has qualified, the decedent's next of kin in order of intestate succession.

ACCESS TO PUBLIC MEETING

“Meeting” or “Meetings” – Va. Code § 2.2-3701



- "Meeting" or "meetings" means the meetings including work sessions, when sitting physically, or through telephonic or video equipment pursuant to § [2.2-3708](#) or [2.2-3708.1](#), as a body or entity, or as an informal assemblage of (i) **as many as three members** or (ii) a quorum, if less than three, of the constituent membership, wherever held, **with or without minutes** being taken, **whether or not votes are cast**, of any public body.
- The gathering of employees of a public body shall not be deemed a "meeting" subject to the provisions of this chapter.

ACCESS TO PUBLIC MEETING

“Meeting” or “Meetings” – Va. Code § 2.2-3701



EMAIL CAN BE A MEETING!

- The VA Supreme Court has held that e-mails may constitute a "meeting".
- Under FOIA if there is simultaneous e-mail communication between three or more board members.
- Avoid "reply to all" as a general rule.

ACCESS TO PUBLIC MEETINGS

"Open Meeting" or "Public Meeting" - Va. Code § 2.2-3701



- "Open meeting" or "public meeting" means a meeting at which the public may be present.



- "Closed meeting" means a meeting from which the public is excluded.

ACCESS TO PUBLIC MEETINGS

Notice of Open Meetings – Va. Code § 2.2-3707(C)



- The Locality **MUST** publish notice of the date, time and location of the meeting *at least three working days prior to the meeting* by:
 1. Placing the notice in a prominent public location where notices are regularly posted; and
 2. In the office of the clerk of the public body or if no clerk the office of the chief administrator;
 3. **New for 2017: Official public government website**
- Notices for special, emergency, or continued meetings given contemporaneously with notice given to members.

2017 change: added “continued” meeting - defined as a meeting continued to address an emergency or conclude the agenda of a meeting which was properly noticed.

ACCESS TO PUBLIC MEETINGS

Meeting Notices – Va. Code § 2.2-3707(E)



May a Citizen Make a Request to Receive Meeting Notices?

- Yes, a person may file a **written** request on an **annual** basis to be notified of meetings by a public body.
- The request must include the requestor's:
 1. Name
 2. Address
 3. Zip code
 4. Daytime telephone number
 5. Electronic mail address and
 6. Organization, if any.

ACCESS TO PUBLIC MEETINGS

Meeting Notices – Va. Code § 2.2-3707(E)



- Upon receipt of the request, the Locality must directly provide notice of all meetings to the person making the request. Notice may be given to the person electronically if he or she does not object.
- Agenda packets and all materials (unless exempt) provided to member must be made available to public.
 - **2017 change:** *Proposed agenda* must also be made available to the public

ACCESS TO PUBLIC MEETINGS

PUBLIC COMMENT



- Is a public body required to have a Public Comment section at its meetings?
 - NO
- Failed 2017 GA bill would have required all public bodies to have a public comment section at every open meeting.
- If a public body elects to have public comment:
 - Must identify on the agenda – place in agenda is up to the public body.
 - Can have more than one public comment section.
 - Can place time limits and restrict subject matter to topics that are not the subject of a public hearing.

ACCESS TO PUBLIC MEETINGS

What if There is an Emergency?



1. The Act provides for notice of an emergency meeting as follows:
 - a. Reasonable notice under the circumstances must be given, and
 - b. The notice must be posted contemporaneously with the notice that is provided to members of the public body who will be conducting the meeting. Va. Code § 2.2-3707(D)

2. “Emergency” – Defined – an unforeseen circumstance rendering the notice required...impracticable and which circumstance requires immediate action. Va. Code § 2.2-3701

ACCESS TO PUBLIC MEETINGS

What if There is an Emergency?



3. Beware of the word “reasonable.” What constitutes reasonable notice will vary based on the circumstances.
4. Also consider, *is it REALLY an emergency?* When at all possible, err on the side of addressing the issue at the next regularly scheduled meeting, rather than calling a special meeting.

ACCESS TO PUBLIC MEETINGS

May a Meeting be Held by Electronic Means?



- Yes, but only in limited circumstances.
 1. State of Emergency: Any public body may meet by electronic communication means without a quorum of the public body physically assembled at one location when the Governor has declared a state of emergency in accordance with § [44-146.17](#), provided (i) the catastrophic nature of the declared emergency makes it impracticable or unsafe to assemble a quorum in a single location and (ii) the purpose of the meeting is to address the emergency. Va. Code § 2.2-3708(G)

ACCESS TO PUBLIC MEETINGS

May a Meeting be Held by Electronic Means?



- Public Body must:
 - (a) give public notice using the best available method given the nature of the emergency, which notice shall be given contemporaneously with the notice provided members of the public body conducting the meeting;
 - (b) make arrangements for public access to such meeting; and
 - (c) otherwise comply with the provisions of the meeting section.
- The nature of the emergency, the fact that the meeting was held by electronic communication means, and the type of electronic communication means by which the meeting was held shall be stated in the minutes.

ACCESS TO PUBLIC MEETINGS

May a Meeting be Held by Electronic Means?



- Pursuant to Va. Code § 2.2-3708.1, members of a governing body can participate electronically in a regularly scheduled meeting if:
 - The Council/Board has enacted through its bylaws an electronic participation in meetings provision and policy.
 - A quorum is physically present at the principal meeting place
 - Arrangements are made for the remote participant to be heard at the principal meeting place
 - On or before the day of the meeting, the member contacts the Chair that they cannot attend due to (i) an *emergency or a personal matter* or (ii) *temporary or permanent disability or medical condition*.
 - Minutes will reflect the nature of the emergency/personal matter and the remote location from which the member is participating.
 - Allowed only 2 times per calendar year

ACCESS TO PUBLIC MEETINGS

Gathering not for Public Business - Va. Code § 2.2-3707(G)



What if There is a Gathering for Purposes Other than to Transact Public Business?

- The Act provides that two (2) or more members of a public body may gather or attend:
 1. Any place or function where the purpose of the gathering or attendance **is not** discussion or transaction of public business and such gathering or attendance was not called or prearranged with any purpose of discussing or transacting any business; OR
 2. A public forum, candidate appearance, or debate, the purpose of which is to inform the electorate and not to discuss or transact public business.

ACCESS TO PUBLIC MEETINGS

Gathering not for Public Business - Va. Code § 2.2-3707(G)



3. But be careful. The gathering or attendance *may not be called or prearranged* (with the purpose of discussing or transacting any public business).
4. Additionally, no public business may be discussed at the gathering.

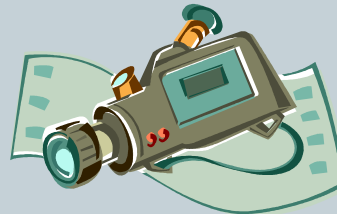
ACCESS TO PUBLIC MEETINGS

Recording Meetings - Va. Code § 2.2-3707(H))



Can a Citizen Record a Public Meeting?

1. Yes. Open meetings may be photographed, filmed, recorded or otherwise reproduced by any attendee.
 - ✦ In fact, you cannot have a meeting in a location that does not permit photographs, filming, recording.
2. Records of open meetings, including audio or audio/visual records, are public records.



ACCESS TO PUBLIC MEETINGS

Can a Citizen Request Minutes from a Meeting?



It Depends...

1. Open Meetings

- a. Minutes at open meetings are *required*.
- b. Minutes, including draft minutes, are *public records*. Va. Code § 2.2-3707(I)

2. Closed Meetings

- a. Minutes may be taken, but are *not required*, during closed meetings.
- b. Minutes of closed meetings are *exempt from mandatory public disclosure*, i.e., they are NOT public records. Va. Code § 2.2-3712(H)
- c. Failed 2017 GA Bill would have required minutes and recordings but not made them subject to FOIA disclosure.

ACCESS TO PUBLIC RECORDS

Must Other Meeting Documents be Made Available?



- Yes. The Act requires that at least one copy of all agenda packets and, unless exempt, all materials furnished to the public body for a meeting be made available to the public for inspection ***at the same time*** the documents are made available to members of the public body. Va. Code § 2.2-3707(F)



ACCESS TO PUBLIC MEETINGS

Must Votes be Taken Publicly? – Va. Code § 2.2-3710(A)



1. All votes of public bodies *must* be taken in an open meeting where its members are physically present, i.e., no telephonic or electronic voting unless electronic meeting provisions are being utilized.
2. *Votes shall not be taken by secret or written ballot.*



CLOSED MEETING PROVISIONS

“Closed Meeting” - Defined – Va. Code § 2.2-3701



- A meeting from which the public is excluded.



CLOSED MEETING PROVISIONS

Commonly Invoked Exemptions – Va. Code § 2.2-3711(A)



1. Personnel Matters.

- Note: The 2016 General Assembly clarified that a Council/Board cannot utilize the personnel record exemption to go into closed session to discuss its own Council or Board compensation.

2. Student Issues and/or Records.

3. Acquisition and Disposition of Property.

4. Privacy –of individuals in personal matters not related to public business.

5. Prospective Business

CLOSED MEETING PROVISIONS

Commonly Invoked Exemptions – Va. Code § 2.2-3711(A)



6. Investment of Public Funds.
7. Test and exams.
8. Public Safety – discussion of plans to protect public safety as it relates to terrorist activity and briefings concerning actions taken to respond to such activity or a related threat.

CLOSED MEETING PROVISIONS

Commonly Invoked Exemptions – Va. Code § 2.2-3711(A)



9. Legal advice.

- a. Consultation with legal counsel and briefings by staff members or consultants pertaining to *actual or probable* litigation, where doing so in an open meeting would adversely affect the negotiating or litigating posture of the public body.
- b. The litigation must have been *specifically threatened* or there is *a reasonable basis to believe it will be commenced* by or against a known party.
- c. The **is not a blanket exception** to cover any occasion that a public body consults with legal counsel or counsel attends.
- d. **New for 2017** – Separates out into independent exemption-
- *“Consultation with legal counsel employed or retained by a public body regarding specific legal matters requiring the provision of legal advice by such counsel.”* (2.2-3711(A)(8))

CLOSED MEETING PROVISIONS

Commonly Invoked Exemptions – Va. Code § 2.2-3711(A)

10. Child Fatality Review Teams – review of specific cases by statutorily created teams.
11. Proprietary Information
12. Contracts – discussion of the award of a public contract, including interviews of bidders or offerors, and discussion of the terms or scope of the contract, where discussion would adversely affect the Locality's bargaining position or negotiating strategy.

CLOSED MEETING PROVISIONS

Closed Meeting Procedures – Va. Code § 2.2-3712(A)



- A closed meeting must be preceded by a vote, recorded in the open session minutes, that approves a motion to recess into closed session. The motion must:
 1. Identify the subject matter;
 2. State the purpose of the closed meeting; and
 3. Make specific reference to the applicable exemption from an open meeting.

A general statement that the body is going into closed session under the provisions of the Act is not sufficient.

CLOSED MEETING PROVISIONS

Closed Meeting Procedures



2. During the closed meeting, discussion may be permitted only on those matters specifically exempted and identified in the motion to recess into closed session. Va. Code § 2.2-3712(C)

3. Upon conclusion of the closed meeting, the public body must reconvene in open session and take a vote that certifies that:
 - a. Only public business matters lawfully exempted from open meeting requirements and
 - b. Only public business matters as identified in the motion to convene in closed sessionwere considered in the closed meeting. Va. Code § 2.2-3712(D)

CLOSED MEETING PROVISIONS

Closed Meeting Procedures



4. The vote upon reconvening must be recorded in the open session minutes.
5. *Any item* adopted, passed or agreed to in a closed meeting must be voted on by the public body in open session. Va. Code § 2.2-3712(G)

CLOSED MEETING PROVISIONS

Closed Meeting Tips



1. Do NOT discuss closed session matters outside of closed session.
2. Do NOT discuss closed session matters after closed session is completed.
3. Do NOT disclose documents handed out, discussed, reviewed or considered during closed session.

CLOSED MEETING PROVISIONS

May Staff Attend Closed Sessions? – Va. Code § 3712(F)



1. The public body may permit nonmembers to attend a closed meeting *if they are deemed necessary or their presence will reasonably aid the public body in its consideration of a topic* that is a subject of the meeting.
2. The *public body makes the decision* who will be allowed to attend or participate in a closed session meeting.

CLOSED MEETING PROVISIONS

JOINT MEETINGS



What if Two Public Bodies Want to Participate in a Joint Meeting?

- The Act permits conferences to be held between two or more public bodies as long as the conferences follow the established procedures for open and closed meetings. Va. Code § 2.2-3711(D)



FOIA ENFORCEMENT



- FOIA Enforced via Court Action for *Writ of Mandamus* or *Injunction*
- **Mandamus:** Affirmative in nature – commands a public officer to take a particular action.
- **Injunction:** Prohibitive in nature – commands a party to refrain from taking or continuing a particular action.

FOIA ENFORCEMENT



- FOIA petitions get priority on court docket – to be heard within seven (7) days of filing.
- The Locality has the burden of proving an exemption exists which properly applies to and supports the decision to withhold documents from an eligible requestor.
- The winning petitioner is entitled to recover costs and attorney fees (unless court finds unjust to award). Court may consider Locality's reliance on an *Attorney General* opinion or prior court decision.

FOIA ENFORCEMENT PENALTIES



- In addition to the granting of a Writ of Mandamus or Injunction, a court may also assess civil penalties for a willful and knowingly made violation of certain FOIA provisions.
- Can be imposed against any officer, employee or member of a public body in their individual capacity if violation was willful and knowingly made.
 - Failed 2017 GA bill would have created a rebuttable presumption that failure to respond to a FOIA request was willful and knowing.
 - Failed 2017 GA bill would have created grounds for termination if officer or employee of public body failed (without legal excuse) to respond to a request received by certified mail.
- Expense
 - First-time violations = \$500-\$2,000.
 - Second and subsequent violations = \$2,000 - \$5,000
 - Failed 2017 GA bill would have also imposed a \$500 civil penalty on members of the public body for invalid closed meeting certification.

QUESTIONS



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